[JUDGMENT ENTERED JANUARY 4, 2019]

No. 18-5257

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANE DOE 2, et al.,
Plaintiffs-Appellees,

v.

PATRICK M. SHANAHAN, in his official capacity as Acting Secretary of Defense, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOVERNMENT'S EMERGENCY MOTION FOR CLARIFICATION OF THIS COURT'S JANUARY 4, 2019 JUDGMENT OR, IN THE ALTERNATIVE, FOR A STAY OF ANY INJUNCTION OR FOR ISSUANCE OF THE MANDATE FORTHWITH

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INTRODUCTION

On January 4, 2019, this Court entered a judgment that "vacate[d] the preliminary injunction" that the district court had entered against the military's new policy regarding service by transgender individuals and simultaneously denied "as moot" the government's motion for a stay of that preliminary injunction pending appeal. Judgment 1 (per curiam). On January 22, the Supreme Court granted the government's applications to stay materially indistinguishable preliminary injunctions that the Ninth Circuit had not yet acted upon in two related appeals, making clear that the military should be permitted to implement its new policy. *See Trump v. Karnoski*, No. 18A625, 2019 WL 271944 (U.S. Jan. 22, 2019); *Trump v. Stockman*, No. 18A627, 2019 WL 271946 (U.S. Jan. 22, 2019). After the government informed the Supreme Court that this Court had already vacated the preliminary injunction and denied the government's stay motion as moot, Chief Justice Roberts denied the government's application to stay the present preliminary injunction. The district court has nevertheless declared in a recent "Notice" to the parties that the "preliminary injunction remains in place," and the military is "not permitted" to implement its policy, "until the D.C. Circuit issues its mandate vacating the preliminary injunction." Ex. A, at 3.

The district court did not explain how this Court could have denied the government's stay motion as "moot" if the preliminary injunction remained in effect. By insisting that the preliminary injunction nevertheless remains in place, the district court has placed the government in an untenable position. In the district court's view,

because this Court vacated the preliminary injunction—thus eliminating the need for a stay from the Supreme Court—but has not yet issued its mandate, the military remains unable to implement its new policy, even though the Supreme Court stayed preliminary injunctions in two other cases in which the Ninth Circuit had not yet issued a decision. Under the district court's interpretation, the government would have been better positioned if this Court had not yet decided the appeal, as in *Karnoski* and *Stockman*, thus necessitating intervention by the Supreme Court. The practical effect of the district court's declaration is that the government is now in a worse position for having prevailed in this Court.

We respectfully ask the Court to make clear that the military may now begin implementing the policy that, as this Court concluded, the district court erroneously enjoined. It has been nearly two months since the Supreme Court stayed the materially identical injunctions in *Karnoski* and *Stockman*; nearly three months since this Court vacated the injunction here; and nearly a year since the military announced its new policy in the first place. Yet the district court still refuses to allow the Department of Defense to implement a policy that senior military leaders have concluded will best serve our national defense.

We respectfully request that this Court clarify that its judgment vacated the preliminary injunction effective immediately, as this Court presumably intended when it denied the government's stay motion as moot. In the alternative, the government renews its previous stay motion in this Court, *see* Gov't Mot. for Stay Pending Appeal

(Dec. 3, 2018) (Stay Mot.), and the Court should grant that motion and stay the preliminary injunction pending issuance of the Court's mandate and any further appellate proceedings. Alternatively, the Court should issue its mandate forthwith. We respectfully request that this Court issue a decision on this motion by March 27, 2019. The military's new policy is scheduled to go into effect on April 12, 2019, and the military requires certainty regarding the policy that will go into effect on that date no later than April 4. A decision from this Court is requested by March 27 to allow the Solicitor General sufficient time to consider whether to seek relief in the Supreme Court, and for such relief to be granted by April 4 if necessary. Additionally, this Court should also enter an immediate administrative stay pending consideration of this motion.[1]

STATEMENT

On January 4, 2019, this Court entered a per curiam judgment that "vacate[d] the preliminary injunction," which had enjoined the military's new policy regarding service by transgender individuals, and simultaneously denied "as moot" the government's motion for a stay pending appeal. Judgment 1; *see id.* (stating "the preliminary injunction is VACATED"). That judgment noted that separate opinions would be filed at a later date, and (per the Court's ordinary practice) directed the Clerk of the Court to withhold

[1] Government counsel has contacted Alan Schoenfeld, counsel for plaintiffs, who indicated that plaintiffs oppose the requested relief.

issuance of the mandate until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. Judgment 1 n.*, 5. On January 31, this Court indicated that the time for rehearing would be extended to 21 days after the issuance of forthcoming separate opinions. Order of January 31, 2019 (per curiam). This Court issued those separate opinions on March 8, with Judge Wilkins concurring, Judge Williams concurring in the result, and no dissent. *See* Concurring Op. 5-26 (Wilkins, J., concurring); Concurring Op. 27-93 (Williams, J., concurring in the result).

Meanwhile, on January 22, 2019, the Supreme Court stayed two materially indistinguishable nationwide preliminary injunctions against the military's policy in two related cases "pending disposition of the Government's appeal[s] . . . and disposition of the Government's petition for a writ of certiorari, if such writ is sought." *Trump v. Karnoski*, No. 18A625, 2019 WL 271944 (U.S. Jan. 22, 2019); *Trump v. Stockman*, No. 18A627, 2019 WL 271946 (U.S. Jan. 22, 2019). The Supreme Court thus made clear that the military should be permitted to implement the policy nationwide pending appeal, including any period for filing a petition for rehearing in the court of appeals. After receiving the government's letter notifying the Supreme Court of this Court's judgment vacating the preliminary injunction in this case, Chief Justice Roberts denied the government's stay application in this case without comment. *See* Docket Entry, *Trump v. Doe 2*, No. 18A626 (U.S. Jan. 22, 2019); *see also* Gov't Letter, *Trump v. Doe 2*, No. 18-677 (U.S. Jan. 4, 2019). On March 7, the only remaining district court to have entered a preliminary injunction against the military's policy granted a stay of its

preliminary injunction, recognizing that it was "bound by the Supreme Court's decision to stay the preliminary injunctions [in *Karnoski* and *Stockman*] in their entirety." Order 6, *Stone v. Trump*, No. 17-cv-2459 (D. Md. Mar. 7, 2019).

On March 8, 2019, the government filed a notice in district court in the present case, noting that in light of the Supreme Court's stays and the *Stone* court's decision to stay its preliminary injunction, "there is no longer any impediment to the military's implementation of the Mattis policy." Doc. 190, at 1. The government explained that although this Court has not yet issued the mandate, its "judgment vacating [the] preliminary injunction took effect when entered," as confirmed by this Court's decision to deny the government's "stay motion 'as moot,' a ruling that necessarily presumes that this Court's injunction does not remain in effect." *Id.* at 1 (quoting Judgment 1). Plaintiffs then filed a response to the government's notice, arguing that the preliminary injunction remains in effect pending this Court's issuance of the mandate. Doc. 191. After the district court directed the government to address plaintiffs' response, the government alternatively requested that the district court grant a stay of any preliminary injunction pending issuance of the D.C. Circuit's mandate and any further appellate proceedings. Doc. 193, at 5-6.

On March 12, the Department of Defense issued Directive-type Memorandum (DTM)-19-004. Doc. 192-1. Effective April 12, 2019, the DTM will implement the military's new policy on service by transgender individuals. Doc. 192-1, at 1.

On March 19, the district court issued a "Notice" to the parties that its "preliminary injunction remains in place until the D.C. Circuit issues its mandate vacating the preliminary injunction." Ex. A, at 3. Until that time, the district court concluded, the government "remain[s] bound by this Court's preliminary injunction" and is "not permitted" to "implement the DTM." *Id.* The district court did not address either this Court's denial of the government's stay motion as moot or the government's alternative request for a stay of the preliminary injunction. With regard to the Supreme Court orders in *Karnoski* and *Stockman*, the Court found that "[t]he fact that the three other nationwide preliminary injunctions which had been in place are now stayed *has no impact* on the continued effectiveness of this Court's preliminary injunction."' *Id.* at 3 (emphasis added).

On March 20, the government once again requested that the district court stay the preliminary injunction pending issuance of the D.C. Circuit's mandate and any further appellate proceedings. *See* Doc. 196.

ARGUMENT

THIS COURT SHOULD TAKE ALL APPROPRIATE STEPS TO ENSURE THAT THE PRELIMINARY INJUNCTION IS NO LONGER IN EFFECT

This Court entered judgment "vacat[ing] the preliminary injunction"—without remanding to the district court to vacate the injunction—while simultaneously denying the government's motion to stay that injunction "as moot." Judgment 1. This Court should take appropriate measures to ensure that its judgment is given meaningful effect

pending issuance of its mandate. The government thus respectfully requests that this Court clarify that the preliminary injunction vacated by the Court's judgment no longer remains in place. In the alternative, this Court should stay any injunction or issue the mandate forthwith.

1. This Court should clarify that its per curiam judgment was effective immediately. This Court's decision to both vacate the preliminary injunction and deny the government's stay motion as moot necessarily implies that the injunction is no longer in place. If the injunction had remained in effect notwithstanding the Court's judgment, the government's request for a stay would not have been moot; either this Court or the Supreme Court would have acknowledged that the government still needed a stay. Therefore, the only tenable interpretation of this Court's judgment is that it was immediately effective in vacating the preliminary injunction. There is no dispute that the Court has the authority to enter a judgment with immediate effect, without remanding to the district court. *See* 28 U.S.C. § 2106 (providing that a "court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances").

Plaintiffs and the district court understand this Court's judgment to mean that, even while the three other stayed injunctions no longer prevent the military from moving forward, this vacated injunction remains an obstacle because the Court's

mandate has not yet issued. But the district court made no effort to square its understanding with the terms of the judgment, which itself vacated the injunction and denied the government's stay motion as moot. None of the cases cited by plaintiffs or the district court addresses the particular circumstances here. This Court should accordingly clarify that the preliminary injunction is no longer in place.

2. Alternatively, this Court may enter a stay of any preliminary injunction that remains in effect. The government therefore renews its stay motion and requests a stay pending all further appellate proceedings. *See* Stay Mot. The Supreme Court has issued stays of materially indistinguishable injunctions in two related cases "pending disposition of the Government's appeal[s] . . . and disposition of the Government's petition for a writ of certiorari, if such writ is sought." *Trump v. Karnoski*, No. 18A625, 2019 WL 271944 (U.S. Jan. 22, 2019); *Trump v. Stockman*, No. 18A627, 2019 WL 271946 (U.S. Jan. 22, 2019). The Supreme Court thus made clear that the military should be permitted to implement the policy nationwide pending appeal, including any period for filing a petition for rehearing in the court of appeals.

Even aside from this Court's determination that the preliminary injunction was erroneous, the Supreme Court's assessment of the factors relevant to the stay determination is independently binding on this Court. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (holding where precedent of the Supreme Court "has direct application in a case . . . [lower courts] should follow the case which directly controls") (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *see also*

Order 6, *Stone v. Trump*, No. 17-cv-2459 (D. Md. Mar. 7, 2019) (granting stay of related preliminary injunction and acknowledging that the district court is "bound by the Supreme Court's decision to stay the preliminary injunctions [in *Karnoski* and *Stockman*] in their entirety"). The district court here entirely failed to address the government's request for a stay, and thus provided no explanation for its failure to follow binding Supreme Court precedent.[2]

3. The government alternatively requests that this Court issue the mandate immediately pursuant to Federal Rule of Appellate Procedure 41(b) and Circuit Rule 41(a)(1). There is good cause to issue the mandate forthwith because this Court denied the government's stay motion as moot, and because the Supreme Court has already made clear that the military should be permitted to implement its new policy during the pendency of all further appellate proceedings, including any time period for rehearing. Pursuant to this Court's rules, the Court may recall the mandate in the event that it were to grant any petition for rehearing en banc. *See* Cir. Rule 41(a)(4).

[2] As noted in the government's prior stay motion, which the government now renews, the district court previously denied the government's motion for a stay. Stay Mot. 1-2; *see also* Fed. R. App. P. 8(a)(2)(A)(ii). Moreover, on March 15, 2019, the government again requested a stay from the district court, which failed to grant (or even address) the requested relief. *See* Doc. 193, at 5-6; Ex. A; Fed. R. App. P. 8(a)(2)(A)(ii). In an abundance of caution, the government has filed a renewed motion for a stay pending appeal in the district court, *see* Doc. 196, but given the impending effective date of the DTM of April 12, 2019, it would be impracticable to await a decision from the district court before filing this motion. *See* Fed. R. App. P. 8(a)(2)(A)(i). We will notify the Court promptly if the district court acts on that renewed request.

CONCLUSION

The government respectfully requests that this Court issue a ruling by March 27, 2019, to clarify that its judgment vacated the preliminary injunction effective immediately. If this Court does not issue such a clarification, it should stay the preliminary injunction pending issuance of the mandate and any further appellate proceedings or, in the alternative, issue the mandate immediately. Additionally, this Court should enter an immediate administrative stay pending consideration of this motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 2,453 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because it has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Tara S. Morrissey
Tara S. Morrissey

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2019, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara S. Morrissey
Tara S. Morrissey

ADDENDUM

Ex. A

Notice, Dkt. No. 195 (Mar. 19, 2019)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,
Plaintiffs
v.
PATRICK SHANAHAN, *et al.*,
Defendants

Civil Action No. 17-1597 (CKK)

NOTICE
(March 19, 2019)

The Court is in receipt of Defendants' [190] Notice. In their Notice, Defendants informed the Court that, as there was no longer an impediment to the military's implementation of the Mattis Policy, Defendants intended to release a Directive-Type Memorandum ("DTM") formally implementing the new policy in the near future. Four days later, Defendants released the DTM. The DTM will formally take effect 30 days after its release, on April 12, 2019.

Defendants were incorrect in claiming that there was no longer an impediment to the military's implementation of the Mattis Policy in this case. Originally, there were four nationwide preliminary injunctions mandating that Defendants maintain the status quo. However, on January 22, 2019, the Supreme Court of the United States issued a short order staying the nationwide preliminary injunctions which had been in place in the United States District Court for the Western District of Washington and the United States District Court for the Central District of California. And, on March 7, 2019, the United States District Court for the District of Maryland stayed its own nationwide preliminary injunction. Accordingly, three of the nationwide preliminary injunctions which had been in place are now stayed.

But, the nationwide preliminary injunction issued by this Court remains in place. On October 30, 2017, this Court issued a preliminary injunction directing Defendants "to revert to the *status quo* with regard to accession and retention that existed before the issuance of the

Presidential Memorandum." Oct. 30, 2017 Memorandum Opinion, ECF No. 61, 4. On January 4, 2019, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") issued a per curiam opinion vacating this Court's preliminary injunction. *Jane Doe 2 v. Shanahan*, No. 18-5257, Jan. 4, 2019 Judgment. However, that Judgment has not been made final through a mandate.

In their opinion, the D.C. Circuit ordered the Clerk of the Court "to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc." *Jane Doe 2*, No. 18-5257, Jan. 4, 2019 Judgment, 5. Usually, a party has 45 days to file a petition for rehearing or for rehearing en banc when an officer of the United States is sued in an official capacity. Fed. R. App. P. 40(a). Under the Rules, Plaintiffs' petition for rehearing or for rehearing en banc would have been due February 18, 2019. But, on January 31, 2019, the D.C. Circuit ordered, on its own motion, that the time for filing any petition for rehearing or petition for rehearing en banc be extended to 21 days after the issuance of the court's forthcoming separate opinions. *Jane Doe 2*, No. 18-5257, Jan. 31, 2019 Order. The D.C. Circuit's separate opinions were filed on March 8, 2019. Accordingly, Plaintiffs have until March 29, 2019 to file for rehearing or rehearing en banc. As of this date, Plaintiffs' time has not expired. As such, the D.C. Circuit's mandate vacating this Court's preliminary injunction has not issued, and the mandate will not issue until March 29, 2019, at the earliest.

Absent a mandate, the D.C. Circuit's January 4, 2019 Judgment vacating this Court's preliminary injunction is not final. Under the Federal Rules of Appellate Procedure, "[t]he mandate is effective when issued." Fed. R. App. P. 41(c). And, as the Advisory Committee notes explain, "[a] court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed." Fed. R. App. P. 41(c) Advisory Committee's notes

(1998). Lacking a mandate, the D.C. Circuit's Judgment is not final, and this Court's preliminary injunction remains in place. *See United States v. DeFries*, 129 F.3d 1293, 1302-1304 (D.C. Cir. 1997) (finding that the D.C. Circuit's judgment was not final absent a mandate).

The fact that the three other nationwide preliminary injunctions which had been in place are now stayed has no impact on the continued effectiveness of this Court's preliminary injunction. On October 30, 2017, this Court ordered Defendants to maintain the status quo as it relates to the accession and retention of transgender individuals in the military. That preliminary injunction remains in place until the D.C. Circuit issues its mandate vacating the preliminary injunction. Lacking a mandate, Defendants remain bound by this Court's preliminary injunction to maintain the status quo. The Court understands, as a practical matter, that because the three other nationwide preliminary injunctions are now stayed, Defendants are permitted by those cases to implement the DTM, but they are not permitted to do so in this case until the mandate is issued.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge